No. 83-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALABAMA POWER CO., *et al.*,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

RESPONSE OF KENNECOTT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF AUTHORITIES

CASES:	Page
Bunker Hill Co. v. *EPA*, 572 F.2d 1286 (9th Cir. 1977)	2
Kennecott Copper Corp. v. *Costle*, 572 F.2d 1349 (9th Cir. 1978)	2
Kennecott Copper Corp. v. *Train*, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 395 (1976)	2
Kennecott Corp. v. *EPA*, 684 F.2d 1007 (D.C. Cir. 1982)	2
Sierra Club v. *EPA*, 719 F.2d 436 (D.C. Cir. 1983)	4
STATUTES:	
The Clean Air Act, 42 U.S.C. § 7401, *et seq.* (Supp. V 1981)	
§ 119, 42 U.S.C. § 7419	2, 3
§ 123, 42 U.S.C. § 7423	2
§ 307, 42 U.S.C. § 7607	5
REGULATIONS:	
Nevada Administrative Code § 445.7657	3
Utah Air Conservation Regulations § 4.3.2	3
FEDERAL REGISTER:	
38 Fed. Reg. 25698, 25700 (1973)	2
40 Fed. Reg. 5511 (1975)	2
40 Fed. Reg. 19212 (1975)	2
40 Fed. Reg. 49364 (1975)	2
41 Fed. Reg. 7452 (1976)	2
47 Fed. Reg. 19332 (1982)	3
48 Fed. Reg. 1717, 1719 (1983)	3, 4
49 Fed. Reg. 6460-61 (1984)	3
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 61-63 (1977)	3
S. Rep. No. 97-666, 97th Cong., 2d Sess. 19-21 (1982)	3

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Kennecott[1] operates copper smelters in four western states—Arizona, Nevada, New Mexico and Utah. The regulations at issue in this case, which were invalidated by the court below, directly affect three of Kennecott's four smelters. For this reason, Kennecott intervened in the proceeding below, and files this Response pursuant to Supreme Court Rule 19.6.

Kennecott supports the Petition for a Writ of Certiorari filed by Alabama Power Co. and other electric utilities, and joins in

[1] Kennecott, formerly Kennecott Minerals Co., is an operating company of the Standard Oil Company of Ohio (Sohio). Subsidiaries and affiliates of Sohio include The British Petroleum Company, Ltd. (Parent), Atlas Supply Company, BP Alaska, Inc., Colonial Pipeline Company, Delaware Bay Transportation Company, Ferix Corporation, Inland Corporation, Iricon Agency Ltd., Laurel Pipeline Company, Miami Valley Corporation, Mid-Valley Pipeline Company, Ress Realty Company, Sohio/BP Trans Alaska Pipeline, Inc., West Texas Gulf Pipeline Company and Sohio Pipeline Company.

the arguments presented therein. In particular, Kennecott agrees that in rejecting certain of the stack height regulations, the court below impermissibly substituted its judgment for that of the Environmental Protection Agency (EPA). For Kennecott and other smelter companies, the result may be destruction of a compliance strategy that has been over a decade in the making at a cost of over a billion dollars.

The unique economic and technological problems facing the smelting industry in its quest for control of sulfur dioxide (SO_2) emissions under the Clean Air Act are well known, having been the subject of numerous cases in the courts of appeal and special statutory relief.[2] Prior to 1977, EPA encouraged smelters to use tall stacks, in conjunction with supplementary control systems (SCS), where other feasible control measures could not produce compliance with SO_2 emission requirements.[3] In 1977, Congress enacted Section 119 of the Act (42 U.S.C. § 7419), which extends this policy through 1987 for smelters meeting an economic eligibility test.[4] Beginning in 1988, all smelters must meet SO_2 emission limitations set according to Section 123 (42 U.S.C. § 7423), which forbids credit for SCS and stacks exceeding heights required by "good engineering practice" (GEP).

The copper smelting industry is now well on its way toward meeting this goal. Since 1970, the industry has reduced SO_2 emissions by 57 percent and by 1988 these emissions will be

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[2] See 42 U.S.C. § 7419 (Supp. V 1981) (permitting issuance of nonferrous smelter orders containing extended compliance schedules); see, *e.g.*, *Kennecott Copper Corp.* v. *Costle*, 572 F.2d 1349 (9th Cir. 1978) (Kennecott II); *Bunker Hill Co.* v. *EPA*, 572 F.2d 1286 (9th Cir. 1977); *Kennecott Copper Corp.* v. *Train*, 526 F.2d 1149 (9th Cir. 1975) (Kennecott I), *cert. denied*, 425 U.S. 395 (1976).

[3] See 41 Fed. Reg. 7452 (July 18, 1976) (1976 stack height policy); 38 Fed. Reg. 25698, 25700 (Sept. 14, 1973) (1973 stack height policy); see also 40 Fed. Reg. 49364 (Oct. 22, 1975) (applying policy to Arizona smelters); 40 Fed. Reg. 19212 (May 2, 1975) (Kennecott New Mexico smelter); 40 Fed. Reg. 5511 (Feb. 6, 1975) (Kennecott Nevada smelter).

[4] See *Kennecott Corp.* v. *EPA*, 684 F.2d 1007 (D.C. Cir. 1982).

reduced still further, a record unmatched by any other major source of SO_2. This reduction has been achieved at a cost of over $1.5 billion, which represents devotion of a larger percentage of available capital to clean air expenditures than that devoted by any other major industry. All four Kennecott smelters now meet ambient standards for SO_2, and Kennecott's expenditures to reach this goal total approximately $750 million in 1982 dollars. As Congress recognized in enacting Section 119, these expenditures have been made during a time of severe economic distress in the copper industry.[5]

In conjunction with these industry efforts, smelter states have spent over a decade developing acceptable smelter SO_2 emission limitations. These efforts have recently culminated in adoption by several states of emission limits based on the new "multi-point rollback" (MPR) method, an advanced modeling technique which has finally put an end to the search for feasible and effective smelter SO_2 emission limits. EPA has already approved smelter MPR regulations adopted by Arizona and New Mexico, and similar regulations adopted by Nevada and Utah are currently pending EPA approval.[6] Upon EPA approval of the MPR regulation for Kennecott's Utah smelter, Kennecott has announced tentative plans to modernize related mining and processing facilities at a cost of over one billion dollars, which will produce still further environmental and operational benefits.[7]

The decision below jeopardizes this entire compliance strategy. The MPR regulations for Kennecott's Arizona, Nevada and Utah smelters depend on GEP demonstrations for tall

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[5] See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 61-63 (1977); see also S. Rep. No. 97-666, 97th Cong., 2d Sess. 19-21 (1982) (economic concerns remain in 1982).

[6] See 48 Fed. Reg. 1717 (Jan. 14, 1983) (Arizona approval); 47 Fed. Reg. 19332 (May 5, 1982) (New Mexico approval); Nevada Administrative Code § 445.7657; Utah Air Conservation Regulations § 4.3.2.

[7] EPA has recognized that Kennecott's Utah modernization plan would greatly reduce particulate emissions. See 49 Fed. Reg. 6460-61 (Feb. 21, 1984) (discussing Kennecott comments on applicable new source performance standards).

stacks originally built in compliance with EPA's smelter policy and necessary to mitigate the effects of nearby mountain ranges.[8] The court's rejection of EPA's "plume impaction" provision, and its restrictive definition of "nearby" as applied to GEP demonstrations involving terrain obstacles, may render the MPR demonstrations invalid. This would waste over a decade in compliance efforts, would add untold millions to smelter compliance costs and would indefinitely prolong the current closure of Kennecott's Arizona and Nevada smelters. The Utah modernization project could be abandoned or indefinitely postponed and the smelter could be shut down, resulting in additional shrinkage of a vital domestic industry already operating well below its former production capacity.[9]

Such drastic consequences are in no way required by the Clean Air Act. In remanding EPA's regulation governing GEP demonstrations based on "nearby" terrain obstacles, the court below admitted that the regulation was rational and supported by the legislative history. *Sierra Club* v. *EPA*, 719 F.2d 436, 444-45 (D.C. Cir. 1983). Nevertheless, the court rejected the regulation based on speculation as to what Congress "may have" intended, admitting that "an element of arbitrariness" would result. 719 F.2d at 445. The court also relied on an alleged congressional intent to discourage utilities from locating in mountainous terrain (*id.*), a consideration obviously inapplicable to smelters which were located in the mountains early in this century to be near related mining and crushing facilities. This rationale also was used to invalidate EPA's plume impaction provision, though the court recognized that this would result in harsh discrimination against sources located in mountainous terrain. 719 F.2d at 453-55.

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[8] The Arizona regulation is based on GEP credit for the stack of a neighboring smelter with which Kennecott shares an airshed. See 48 Fed. Reg. 1719 (Jan. 14, 1983) (GEP demonstration for ASARCO smelter stack).

[9] The decision below already has delayed the Utah modernization project by delaying EPA approval of the Utah MPR regulation, without which the project cannot proceed.

In short, the D.C. Circuit rejected EPA's interpretation of an ambiguous and highly technical statute that reached admittedly reasonable results, and substituted its own interpretation which produces results admittedly arbitrary and discriminatory. The consequences will likely include destruction of a smelter SO_2 compliance strategy that has been over a decade in development. Despite Kennecott's participation as an intervenor, the impact of the court's decision on the copper smelting industry is not even mentioned in the opinion below. And the court remains free to apply its convoluted canon of statutory construction to all Clean Air Act regulations of national importance, because the Act requires review of such regulations in the D.C. Circuit (see 42 U.S.C. § 7607(b)). For these reasons, as well as those advanced in the utilities' Petition, Kennecott urges this Court to grant *certiorari* and reverse the decision of the court of appeals.

Respectfully submitted,

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